Supreme Court of the United States

October Term, 1952

No. 439

LOUIS LEVINSON AND MITCHELL A. HALL,
Petitioners,

v.

WILLIAM DEUPREE, JR., ANCILLARY ADMINISTRATOR OF THE ESTATE OF KATHERINE WING, DECEASED,
Respondent.

SUPPLEMENTAL MEMORANDUM BRIEF OF PETITIONERS

CHARLES E. LESTER, JR.,
STEPHENS L. BLAKELY,
Proctors for Petitioners.

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SUBJECT INDEX

Table of Cases Cited

Statutes Cited

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Upon oral argument of this case on February 6, 1953, Mr. Chief Justice Vinson called the attention of counsel for petitioners to the case of **Ebner, et al. v. Official Board of Methodist Episcopal Church of Pineville,** 1926, 214 Ky. 70, 282 S. W. 785, and suggested to counsel that if he desired to do so, he might file memorandum discussing the *Ebner* case and Carroll's Kentucky Code of Practice in Civil Cases, Section 92.

The recollection of counsel is that the Court invited discussion of the **Ebner** case as it might apply to the case at bar.

The **Ebner** case refers to Section 92, Subsection 2, of the Civil Code and for a better understanding of this section, it is quoted as follows in its entirety:

Sec. 92. SPECIAL DEMURRER DEFINED; WAIVER; COSTS. A special demurrer is an objection to a pleading which shows—

1. COURT NO JURISDICTION. That the court has no jurisdiction of the defendant or of the subject of the action; or,

2. PLAINTIFF NO LEGAL CAPACITY TO SUE. That the plaintiff has not legal capacity to sue; or,

3. ANOTHER ACTION PENDING. That another action is pending in this State, between the same parties, for the same cause; or,

4. DEFECT OF PARTIES; WAIVER; COSTS. That there is a defect of parties, plaintiff or defendant. Either of said grounds of objection, shown to exist by a pleading, is waived, unless distinctly specified by a demurrer thereto, except the objection to the jurisdiction of the court of the subject of the action, which objection is not waived by failing so to make it; but a party failing so to make it when or before he files a pleading, other than a demurrer, is liable for all costs resulting from such failure.

In the **Ebner** case it was insisted that it did not appear from the petition that the official board of the church was an incorporated body; or that it had capacity to sue, as members of the board were not made parties plaintiff. The Court of Appeals of Kentucky pointed out that by Section 92, Subsection 2, of the Civil Code, the objection that the plaintiff has not legal capacity to sue must be made by special demurrer. No special demurrer had been filed in the **Ebner** case although a general demurrer had been interposed to the petition and the court held that the general demurrer was a waiver of the objection that plaintiff did not have capacity to sue as specifically provided by Subsection 4 of Section 92.

It appears from an examination of Shepard's Kentucky Citations that the latest expression of the Kentucky Court of Appeals applying the rule in the **Ebner** case and citing

it as authority is that of **Farmer v. Sales, et al.**, 1946, 303 Ky. 124, 196 S. W. (2d) 980. In this case, as in the **Ebner** case, defendants first filed a general demurrer to the petition and upon it being overruled, filed a special demurrer upon the ground that the petition showed that the plaintiff did not have legal capacity to maintain the action. The only question before the court was whether the general demurrer operated to waive the objection of want of legal capacity to sue. The court said:

> "Here, the court had jurisdiction of the subject of the action, and the only question is: Did the general demurrer operate to waive the objection for want of legal capacity to sue? We have held in numerous cases that such an objection, where the grounds appear on the face of the pleading, must be made by special demurrer, and that a general demurrer operates as a waiver. *Walton* v. *Washburn*, 64 S. W. 634, 23 Ky. Law Rep. 1008; *Bannon* v. *Fox*, 199 Ky. 262, 250 S. W. 966; *Ebner* v. *Official Board of the M. E. Church*, 214 Ky. 70, 282 S. W. 785; *Wedding* v. *First National Bank*, 280 Ky. 610, 133 S. W. 2d 931. *Cf. Gorin* v. *Gorin*, 292 Ky. 562, 167 S. W. 2d 52; *Shaw* v. *Straugh's Adm'r*, 294 Ky. 558, 172 S. W. 2d 50. It follows that the court erred in sustaining the special demurrer."

Counsel for petitioners have no quarrel with the rule announced in the **Ebner** and **Farmer** cases. These cases state the rule as counsel have always understood it to be. But it is suggested that neither of these cases militate against the argument of petitioners either in brief, or as presented orally.

It will be recalled that the original libel as it appears at R. 1-3 alleged the appointment and qualification of respondent as ancillary administrator of the estate of decedent in the County Court of Kenton County, Kentucky. This allegation is contained in Article 1 of the libel. This

allegation of such appointment and qualification in the Kenton County Court was denied by Article 1 of the answer of Levinson and by Article 1 of the answer of Hall.

Since it did not appear affirmatively in the language of the original libel that the Kenton County Court was without jurisdiction to appoint respondent administrator, petitioners could not at this stage of the proceedings attack the original libel by special demurrer. Their first opportunity to do so occurred immediately following the filing by respondent of his affidavit for leave to sue in forma pauperis as it appears at R. 8-9.

The application for leave to sue in forma pauperis was made by affidavit filed filed July 7, 1949. On this same date each petitioner filed his special demurrer and they appear at R. 9-11 and are each, except for the interchange of the names of the two petitioners, in this language:

> "The respondent, Louis Levinson, demurs specially to the libel of William Deupree, Jr., Ancillary Administrator of the Estate of Katherine Wing, deceased, upon the ground that it is apparent upon the face of the record herein (1) that this Court has no jurisdiction to try the within cause and (2) that this Court has no jurisdiction over the subject matter and (3) that the libelant has not legal capacity to sue."

Except for the affidavit of respondent for leave to sue in forma pauperis which, among other things, stated that "decedent was possessed of no estate" the special demurrers would very properly have been overruled. But, as appears from the order of the District Court entered on September 29, 1949, and appearing at R. 15-16, the District Court read the affidavit into the libel and considered its contents in ruling on the special demurrer and sustaining the special demurrer. The language of the District Court employed in making this ruling is as follows:

"The affidavit of the libelant setting forth the fact that the decedent had no property in this state at the time of her death should be considered by the Court in ruling on the special demurrer. To this ruling the libelant objects and excepts."

Petitioners did all they could, and as early as they could, to call to the District Court's attention its lack of jurisdiction to try the cause and that respondent did not have legal capacity to sue. They attacked the validity of the order of the Kenton County Court by both answer and special demurrer.

It will also be recalled that the amended libel as it appears at R. 12-15 pleaded the appointment of respondent as ancillary administrator in both the County Court of Kenton County and the County Court of Campbell County, Kentucky. Of course, the amended libel was not subject to special demurrer because unquestionably the County Court of Campbell County had jurisdiction to appoint respondent to the office of administrator and respondent under the Campbell County appointment had capacity to bring his action.

The attack made upon the amended libel was by general demurrers as same appear at R. 16-18. These general demurrers were sustained because, as the District Court said in its memorandum of September 26, 1949, appearing at R. 19:

"Under the Kentucky authorities the appointment of William Deupree, Jr., as ancillary administrator by the Kenton County Court was void. The amendment setting up his subsequent appointment by the Campbell County Court, shown on the face of the record to be more than a year after the alleged wrongful death cannot relate back to the inception of the libel proceeding and the claim is barred. *Vassill's Admr., etc.* v. *Scarsella*, 292 Ky. 153; *Jewell Tea Co., et al.* v. *Walker's Admr.*, 290 Ky. 328.

"An Order sustaining the general demurrer is this day entered."

A judgment entered October 5, 1949, and appearing at R. 21 dismissing the libel as amended was entered following respondent's declining to plead further.

Upon reversal of the judgment by the United States Court of Appeals (mandate appearing at R. 22-23), the District Court pursuant to the mandate by order appearing at R. 35 overruled petitioners' general demurrers to the amended libel and thereupon each petitioner filed answer to the libel as amended. The petitioner Levinson by Article 1 of his answer to the libel as amended denied *in toto* respondent's allegation of his appointment to the office of administrator either in the County Courts of Kenton or Campbell in Kentucky. By Article 5 of his answer Levinson specifically pleaded the statute of limitations and by Article 10 pleaded the absence of jurisdiction in the District Court to try the cause and that respondent did not have legal capacity to sue. Since his demurrer to the libel as amended had been overruled, the only way petitioner Levinson could set up those defenses was by his answer to the libel as amended.

Petitioners were prevented from offering proof in support of their plea of the statute of limitations and their plea of want of capacity of respondent to sue and their plea of want of jurisdiction in the District Court to try the cause for the reason that, on motion of respondent appearing at R. 43-46, the court by order appearing at R. 47 struck out these pleas from the answer to the libel as amended. There was nothing further petitioners could do.

Similarly, in the answer of petitioner Hall to the libel as amended, he, by Article 1, denied respondent's allegation of his appointment as administrator by the County Courts of either Kenton or Campbell in Kentucky, and by Article

5 of his answer pleaded the bar of the statute of limitations. By the same order appearing at R. 47 his plea of the statute of limitations was stricken from his answer.

That petitioners properly raised these questions in the court below is indicated by a reading of **Jewel Tea Company v. Walker's Adm'r**, 1942, 290 Ky. 328, 161 S. W. (2d) 66. In that case W. A. Walker, suing as administrator of the estate of John Walker, brought his action in the Muehlenberg Circuit Court to recover of Jewel Tea Company for the death of decedent which resulted from being struck by a motor truck of that company. The accident occurred in Muehlenberg County on March 13, 1938. Soon after the death of John Walker, W. A. Walker, a resident of Webster County, Kentucky, was appointed administrator of decedent's estate by the County Court of Webster County. A trial of the case resulted in a jury verdict and a judgment thereon in the sum of $2,000.00 in favor of the administrator, and to reverse that judgment Jewel Tea Company appealed, one of the grounds for reversal being that the appointment of W. A. Walker by the Webster County Court as administrator of the estate of the deceased was void.

It was alleged in the petition that the deceased died intestate a resident of Webster County, Kentucky, and that immediately thereafter W. A. Walker was by proper orders of the Webster County Court appointed administrator and thereupon qualified and was the duly acting qualified administrator of the estate of John Walker. The petition furthier alleged the negligent operation of the motor truck owned by Jewel Tea Company. A general demurrer to the petition was filed and without waiving same an answer was filed denying the allegations of negligence in the operation of the truck *but this answer did not deny the allegations of the petition with respect to the appointment of the administrator, or that he was the duly acting qualified administrator of the decedent's estate.*

It developed, however, by the evidence of the administrator, that his decedent was a resident of Springfield, Illinois, at the time of his death and was not a resident of Webster County, Kentucky, as alleged in the petition. The administrator resided in Providence in Webster County. The trial court ruled that evidence on the question of the residence of decedent was irrelevant and incompetent since the answer did not deny that the appellee was the duly appointed and qualified administrator of the estate of the decedent. Counsel for Jewel Tea Company stated that he did not know until that time that decedent was not a resident of Webster County, Kentucky, at the time of his death and did not know that appellee was not the legal administrator of the estate of decedent until after the trial began on that day when appellee testified, and further stated that it is now shown that the decedent was a resident of the State of Illinois at the time of his death. Counsel then moved the court to dismiss the case because the Webster County Court that appointed appellee as administrator had no authority to make such appointment because decedent was not a resident of Webster County at the time of his death, but was a resident of Springfield, Illinois, and the injury resulting in his death occurred in Muehlenberg County and, therefore, the attempted appointment of an administrator by the Webster County Court was void for want of jurisdiction. The court sustained objections to the motion on the ground that there was no denial of the allegations in the petition that decedent was a resident of Webster County at the time of his death, or that appellee was the duly qualified and acting administrator of decedent's estate and, therefore, no issue to which evidence could be directed.

Counsel for Jewel Tea Company then moved the court to discharge the jury and continue the case on the grounds of surprise, in that they did not know until the trial started that appellee was not legally appointed administrator, and

not authorized to maintain the action, and asked an opportunity to present the facts, if the court needed further facts, in support of his motion. The court again sustained objections to this motion on the ground that there was no issue made on the pleadings on the question, and further, that there was no showing that counsel could not have by the exercise of due diligence known of the facts.

In disposing of the contention that the want of capacity of plaintiff to sue was not timely raised the court had this to say:

> "It is not insisted in brief for appellee that the county court of Webster county had the right or jurisdiction to appoint an administrator of decedent's estate. He relies solely upon the fact that the allegations in the petition with respect to the appointment of appellee as administrator, as we have hereinbefore recited, were not denied. Since, however, the county court of Webster County was without jurisdiction to appoint an administrator of decedent's estate and the attempted appointment being void, we do not think that under the facts disclosed in the record, the failure of appellants to deny that appellee was legally appointed, or the legally constituted administrator of decedent's estate, constituted a waiver of the question, if it be conceded that such question could be waived, or that it gave any life or validity to such void appointment. It appears that the decedent was a stranger to appellants and the people in the community where the accident occurred and his identification was not established until the evening of the next day after he died. It was finally learned that his name was John Walker and that his brother W. A. Walker, appellee herein, lived in Providence, Webster county, Kentucky. The county court of Webster county then proceeded to appoint appellee administrator of decedent's estate. Since the statute gave jurisdiction only to the county court of the county of the residence of the decedent to grant administration and, it being alleged in the peti-

tion that decedent was a resident of Webster county, in such circumstances it was natural or reasonable for appellants to assume that decedent was a resident of Webster county. It appears that the question was raised at the first reasonable opportunity."

A situation greatly similar is presented in the case at bar. Not only did petitioners deny by their answers the appointment of respondent to the office of administrator but at their first opportunity they specifically brought it to the court's attention by their special demurrers. And they again brought respondent's lack of capacity to sue to the court's attenton by their specific pleas of their answers as hereinbefore pointed out. In the **Jewel Tea** case the answer did not deny the allegation of the appointment and qualification of the administrator yet the court held that the requirement of the rule was met by counsel bringing the matter to the court's attention upon his first opportunity so to do. If any other procedure could have been followed by counsel for petitioners in the case at bar, it is not known to them what it could be under the Kentucky or the admiralty practice.

Respectfully submitted,

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